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YOLO SUPERIOR COURT

OCT 27 2009

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14 MARCO ANTONIO TOPETE

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF YOLO**

15 THE PEOPLE OF THE STATE OF
16 CALIFORNIA,
17 vs.
18 MARCO ANTONIO TOPETE,
19 Defendant.

Case No.: 08-3355

NOTICE OF MOTION AND MOTION FOR
PRETRIAL DISCOVERY COMPLIANCE
ORDER; MEMORANDUM OF POINTS
AND AUTHORITIES (PEN C §1054.5.)

Date: November 6, 2009
Time: 8:30 a.m.
Dept: 6

TO: THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY:

NOTICE IS HEREBY GIVEN that on the date and time indicated above, or on such date as the matter may be heard, Defendant MARCO TOPETE, by and through his attorneys Hayes H. Gable III and Thomas A. Purtell, will move that the Court compel discovery of the items previously requested informally of the prosecution on March 16, 2009, and not given to the defense. Those items are listed in the attached Declaration by Hayes H. Gable III. This motion will be based on the attached memorandum of points and authorities, the attached declaration,

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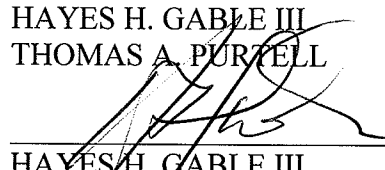
1
2 the attached exhibits, all papers filed and records in this action, evidence taken at the hearing on
3 this motion, and argument at that hearing.

4 Dated: 10-27-09

Respectfully submitted,

6 HAYES H. GABLE III
7 THOMAS A. PURTELL

8 By:

9 
HAYES H. GABLE III
Attorney for the Defendant
MARCO ANTONIO TOPETE

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MEMORANDUM OF POINTS AND AUTHORITIES

AN INFORMAL DISCOVERY REQUEST HAS ALREADY BEEN MADE OF THE PRESECUTION AND THE PROSECUTION DID NOT DISCLOSE ALL REQUESTED ITEMS

The defense is required to informally seek discovery at least 15 calendar days before asking for court-ordered discovery. (California Penal Code §1054.5(b) ¹.) In this case, the defense met that obligation. The defense submitted an informal discovery request by facsimile and First Class Mail to the District Attorney on March 16, 2009. A copy of that informal request is attached as Exhibit A. The prosecution provided an informal response to that letter on July 24, 2009. A copy of that informal response is attached as Exhibit B. In that informal response the prosecution agreed to partially comply with the request. (See Exhibit B.)

THE DEFENSE ASKS THE COURT TO ORDER THE PROSECUTION TO DISCLOSE TO THE DEFENSE THE ITEMS LISTED BELOW. ALL OF THEM WERE REQUESTED INFORMALLY OF THE PROSECUTION .

The prosecution did not disclose every item requested by the defense in its informal discovery motion. (Exhibit A.) The defense therefore requests that the court order the prosecution to disclose to the defense those items set out below, which were informally requested but not disclosed. The prosecution has only partially complied where noted.

1. All notes and memoranda, handwritten or typed, and all reports made by law enforcement officers or special agents or special investigators of the People, which contain substantive information relevant to any crime charged against the defendant in the above entitled action, whether or not incorporated into any official report. It is further requested that the prosecution immediately notify all law enforcement officers involved in the investigation of this case to preserve any original notes they may have made during the investigation of this case.

(California Penal Code §1054.1(e), (f); *People v. Riser* (1956) 47 C.2d 566, 585 (holding that “[a]bsent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the

¹ All further references are to the California Penal Code, unless otherwise noted.

1 accused access to all evidence that can throw light on issues in the case”; *In re Littlefield*
2 (1993) 5 Cal.4th 122,135, 136 (requiring disclosure of “such information is known or is
3 reasonably accessible” by prosecution); *Izazaga v. Superior Court* (1991)) 54 C.3d 356
4 (providing that the prosecutor has a federal constitutional duty to disclose exculpatory
5 evidence wholly independent of the statutory scheme and regardless of whether a
6 discovery request is made); *Brady v Maryland* (1963) 373 US 83; see also *People v.*
7 *Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

8 **ORDER OF THE COURT: Granted _____ Denied _____**

9 **Ordered, with the following modification:**

10 2. The names and addresses of all persons known to the People who are percipient
11 witnesses to the alleged offense(s), or who claim to be witnesses to any transaction or
12 event constituting part of, or which the People contend proves or tends to prove, any
13 element of any crime charged against the defendant in the above entitled action or of
14 persons who have, or claim to have, any information material and relevant to the
15 prosecution of the defense of this case, whether or not they are to be called by the
16 prosecution to testify at trial, and the names and business addresses of all law
17 enforcement offices who are known to be percipient witnesses to instant case or have
18 relevant information concerning the case.

19 (§1054.1(a), (e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court,*
20 *supra*; *Castiel v. Superior Court* (1958) 162 Cal.App.2d 710, 711 (reversing a conviction
21 for failing to disclose, in advance of the new trial, the information regarding an
22 informant, finding that refusal “is a delaying action only”); *DeLosa v. Superior Court*
23 (1958) 166 Cal.App.2d 1, 3 (ordering the trial judge to order disclosure of a confidential
24 agent mentioned in the grand jury); *Brady v Maryland, supra*; see also *Honore v.*
25 *Superior Court* (1969) 70 Cal.2d 162, 169; *People v. Borunda* (1974) 11 Cal.3d 523,
26 528.)

27 **ORDER OF THE COURT: Granted _____ Denied _____**

28 **Ordered, with the following modification:**

1 3. All information orally related to law enforcement persons, or related orally to the
2 district attorney and his agents by potential witnesses concerning or relating to, the
3 prosecution of the pending charges.

4 (§1054.1(a), (e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court*,
5 *supra*; *Castiel v. Superior Court, supra*, 162 Cal.App.2d at 711; *DeLosa v. Superior*
6 *Court, supra*, 166 Cal.App.2d at 3.)

7 **ORDER OF THE COURT: Granted _____ Denied _____**

8 **Ordered, with the following modification:**

9 4. Records of any arrests or convictions of witnesses for the prosecution for crimes
10 which may indicate moral turpitude and which might be used for impeachment or
11 enhancement or for any other purpose.

12 a. The prosecution agreed to partially comply by running state and interstate
13 “rap” sheets of prospective witnesses, and to give “some kind of summary” of
14 arrest and conviction information from those sources. They also stated that
15 they will not provide the rap sheets of witnesses without a court order.

16 (§1054.1(a), (d), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court*,
17 *supra*; *People v. Wheeler* (1992) 4 Cal.4th 284, 300 (holding that misdemeanor
18 misconduct involving moral turpitude may provide a basis for impeachment); *People v.*
19 *Santos* (1994) 30 Cal.App.4th 169, 175 (holding that a defendant has a federal right to
20 discover misdemeanor convictions of prosecution witnesses); California Constitution 25
21 article I, section 28(d); *People v Wheeler* (1992) 4 C4th 284; *People v Mickle* (1991) 54
22 C3d 140, 168; Evidence Code §§ 780, 788. See also *Brady v Maryland, supra*.)

23 **ORDER OF THE COURT: Granted _____ Denied _____**

24 **Ordered, with the following modification:**

25 5. Notify defense counsel of the existence of any informant used in connection with the
26 investigation or prosecution of the pending matter.

27 (§1054.1(a), (e); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court*,
28 *supra*; *Castiel v. Superior Court, supra*, 162 Cal.App.2d at 711; *DeLosa v. Superior*
Court, supra, 166 Cal.App.2d at 3.)

1 **ORDER OF THE COURT: Granted _____ Denied _____**

2 **Ordered, with the following modification:**

3 6. Provide the fact of any criminal charges pending in Yolo County against any witness
4 and the fact of any criminal charges which the Bureau of Criminal Identification and
5 Investigation rap sheets indicates are pending in any other county of the State of
6 California, or elsewhere, against any witness. (Limited to information within the
7 district attorney's possession or to which he has knowledge.)

8 a. The prosecution agreed to partially comply by running state and interstate
9 "rap" sheets of prospective witnesses, and to give "some kind of summary" of
10 arrest and conviction information from those sources. They also stated that
11 they will not provide the rap sheets of witnesses without a court order.

12 (§1054.1(d), (e); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court,*
13 *supra*; *People v. Wheeler, supra*, 4 Cal.4th at 300; *People v. Santos, supra*, 30 Cal.App.4th
14 at 175.)

15 **ORDER OF THE COURT: Granted _____ Denied _____**

16 **Ordered, with the following modification:**

17 7. If an informant is provided in compliance to number [5], then provide defense
18 counsel with all reports and information concerning confidential and/or anonymous
19 informant's information supplied to law enforcement which relates to the instant case
20 and/or crimes. This would include the actual substance of the information received,
21 the time and place of receipt, and the name of the person who received this
22 information. In the alternative, notify defense counsel should this information be
23 claimed to be privileged.

24 (§1054.1(a), (e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court,*
25 *supra*; *Castiel v. Superior Court, supra*, 162 Cal.App.2d at 711; *DeLosa v. Superior*
26 *Court, supra*, 166 Cal.App.2d at 3.)

27 **ORDER OF THE COURT: Granted _____ Denied _____**

28 **Ordered, with the following modification:**

1 8. All "case summaries" prepared by any law enforcement officials or employee.
2 (§1054.1(e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court, supra*,
3 54 C.3d 356; *Castiel v. Superior Court, supra*, 162 Cal.App.2d at 711; *DeLosa v.*
4 *Superior Court, supra*, 166 Cal.App.2d at 3; *Brady v Maryland, supra*.)

5 **ORDER OF THE COURT: Granted _____ Denied _____**

6 **Ordered, with the following modification:**

7 9. Notify defense counsel of the destruction of any notes of any law enforcement officer
8 relating to a statement taken from the defendant concerning this case.

9 (§1054.1(b), (e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court,*
10 *supra*, 54 C.3d 356; *Brady v Maryland (1963)* 373 US 83.)

11 **ORDER OF THE COURT: Granted _____ Denied _____**

12 **Ordered, with the following modification:**

13 10. All documents, reports, publications and photographs which the gang officer has
14 referred to, considered or relied upon in arriving at his/her opinion that the Norteños
15 are a criminal street gang that has as one of its primary activities the commission of
16 the acts enumerated in Penal Code §186.22

17 i. This documentation does not include the "predicate act," which the
18 prosecutor must introduce in order to prove the "pattern of criminal
19 gang activity;" and

20 ii. This documentation is limited to the three-year period before the
21 commission of the charged offense as specified by California Penal
22 Code §186.22, unless the gang officer has no documentation
23 pertaining to that period and has referred to, considered or relied on
24 documentation for a period of time prior to the three-year period
25 before the charged crimes.

26 (§1054.1(e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court, supra*,
27 54 C.3d 356.)

28 **ORDER OF THE COURT: Granted _____ Denied _____**

Ordered, with the following modification:

1 11. All Woodland Police Department/Yolo County Sheriff's Department rules and
2 regulations, whether public or for internal use only, including any informal rules and
3 regulations and memoranda relating to the process and standards utilized by its
4 (deputies/officers) in deciding whether to identify and/or label an individual as a gang
5 member, associate or affiliate including any similarly described materials that specify
6 what quantum and types of information are sufficient before identifying and/or
7 labeling an individual s a gang member, associate or affiliate.

- 8 a. The prosecution partially complied with this request by providing some
9 information regarding the criteria that the Woodland Police Department uses
10 to validate gang members. The prosecution objected to the relevance of the
11 request as to the Yolo County Sheriff's Department insofar as the expert is
12 employed by the Woodland Police Department.

13 (§1054.1(e), (f); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court, supra*,
14 54 C.3d 356.)

15 **ORDER OF THE COURT: Granted _____ Denied _____**

16 **Ordered, with the following modification:**

17 12. All rules and regulations, whether public or for internal use only, including any
18 informal rules and regulations and memoranda relating to the process and standards
19 utilized by its (deputies/officers) in deciding whether to purge an individual identified as
20 a gang member, associate or affiliate from records maintained by the Woodland Police
21 Department/Yolo County Sheriff's Department.

- 22 a. The prosecution partially complied with this request by providing some
23 information regarding the criteria that the Woodland Police Department uses
24 in deciding whether to purge an individual identified as a gang member,
25 associate, or affiliate. The prosecution objected to the relevance of the request
26 as to the Yolo County Sheriff's Department insofar as the expert is employed
27 by the Woodland Police Department.
28

1 (§1054.1(e); *People v. Riser, supra*, 47 C.2d at 585; *Izazaga v. Superior Court, supra*, 54
2 C.3d 356.)

3 **ORDER OF THE COURT: Granted _____ Denied _____**

4 **Ordered, with the following modification:**

5 CONTINUING ORDER; COPIES OF ORDER TO BE GIVEN TO LAW
6 ENFORCEMENT

7 The defendant requests that each of the above orders be continuing orders through the
8 completion of trial, so that items granted that become available after the date of this order are to
9 be made immediately available to defense counsel. This order is to be given to the prosecutor's
10 investigator and to the police officer in charge of investigating this case, and those persons must
11 immediately give all reports to the prosecutor, who must immediately give them to defense
12 counsel.

13 **ORDER OF THE COURT: Granted _____ Denied _____**

14 **Ordered, with the following modification:**

15
16 Dated: 10-27-09

Respectfully submitted,

17 HAYES H. GABLE III
18 THOMAS A. PURTELL

19
20 By: 

21 HAYES H. GABLE III
22 Attorney for the Defendant
23 MARCO ANTONIO TOPETE
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1 CERTIFICATE OF SERVICE

2 I am a citizen of the United States and a resident of the County of Yolo. I am over the
3 age of eighteen years and not a party to the above-entitled action; my business address is 430
4 Third Street, Woodland, CA 95695

5 On the date below, I served the following document(s):

6 **NOTICE OF MOTION AND MOTION FOR PRETRIAL DISCOVERY COMPLIANCE**
7 **ORDER; MEMORANDUM OF POINTS AND AUTHORITIES**

8 () BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in
9 the United States Mail at Sacramento, California addressed as follows:

10 (X) BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the
11 offices of the person(s) listed below:

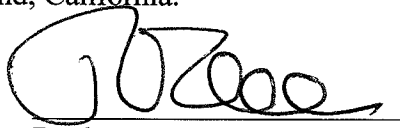
12 JEFF REISIG
13 GARRET HAMILTON
14 Yolo County District Attorney
301 Second Street
Woodland, CA 95695

16 () BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the
17 person(s) listed below:

18
19 () BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an
20 attachment to the person(s) listed below:

22 I declare under penalty of perjury that the foregoing is true and correct.

23 Executed on October 27, 2009, at Woodland, California.

25
26 
27 Declarant
T. PURCELL
28